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# IN THE
# UNITED STATES
# SUPREME COURT

**October Term, 1980**

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAY PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LEASTER TEATER, unknown claimants, unknown owners, and any and all unknown heirs, divisees, legatees, and assigns of NELLIE F. GILL, deceased,

*Appellants,*

-vs-

H. JOHN VAN SLOOTEN,

*Appellee.*

## MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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## MOTION TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS

Appellee, H. JOHN VAN SLOOTEN, Pursuant to Rule 16.1 (b) of the Rules of the Supreme Court of the United States, and moves this Court to dismiss the Appellants' appeal in this matter, filed under 28 USC 1257 (2), 1976, or, in the alternative, to affirm the decision of the Supreme Court of the State of Michigan in *Van Slooten* v *Larsen, et al*, 410 Mich 21; 29 NW 2d 704 (1980), on the grounds that, as hereinafter set forth.

## STATEMENT

This is an appeal from a final decision of the Michigan Supreme Court. The Michigan Supreme Court had before it the question of the constitutionality of that state's dormant mineral act.

Following are the stipulated facts, as presented to the trial court:

1. The premises which are the subject to this action are described as the Southeast Quarter of the southeast Quarter (SE ¼ SE ¼) of Section 14, Township 27 North, Range 7 West Kalkaska Township, Kalkaska County, Michigan.

2. Nellie F. Gill, ancestor of all the known defendants to this action, by Warranty Deed dated April 32, 1943, recorded August 7, 1945 in Liber 53 at Page 401, conveyed said premises but expected from said conveyance and reserved unto herself and her heirs all of the oil and mineral rights in and on said aforedescribed premises.

3. Through mesne conveyances John Van Slooten, being one and the same H. John Van Slooten, plaintiff herein, acquired title to the subject premises by Quit Claim Deed dated January 2, 1959,

recorded January 26, 1959 in Liber 81 at Page 376. Plaintiff to date has not conveyed any of his interest acquired by said Quit Claim Deed.

4. That on June 29, 1970, being in excess of 24 years since the aforedescribed reservation of oil and mineral rights, the first recorded instrument affecting or asserting an interest in the aforedescribed reservation was recorded being an oil and gas lease from Elsie M. Dick, one of the defendants herein, to Pan American Petroleum Corporation, and recorded in Liber 114 at Page 559 and 560.

5. Thereafter all the defendants or their ancestors executed oil and gas leases in favor of Pan American Petroleum Corporation or its successor in interest, Amoco Production Company.

6. With regard to the aforedescribed oil and mineral rights reserved by Nellie F. Gill, no drilling permit has been issued, nor has actual production occurred, nor has withdrawal of oil or gas from said lands, nor from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operation therewith, nor has such interest been used in underground gas storage operations during the 20 year period immediately following August 7, 1945.

7. Neither Nellie F. Gill nor her heirs have recorded a written notice in the Register of Deeds Office for Kalkaska County during the 20 year period immediately following August 7, 1945, nor during the three year period immediately following September 6, 1963, stating that they, or any of them, desire to preserve the aforesaid interest and do not intend to abandon the same.

The Michigan dormant mineral act was passed in 1963. It provided a three year period during which mineral in-

terest owners outstanding at that time could register their interest.

The trial court found the act unconstitutional. The Court of Appeals reversed, and the Michigan Supreme Court affirmed the Court of Appeals decision.

## ARGUMENT

This case presents no substantial federal question for this Court to decide because similar related laws have been previously considered by this Court, and found to be constitutional. The Michigan dormant mineral act, MCLA 554.291 et seq.; MSA 26.1163 (1) et seq., which was found by the Michigan Supreme Court to be constitutional, has its origins firmly rooted in what can be characterized as "black letter law", that is, the American system of recorded land titles and marketable title legislation, and statutes of limitation. These laws, i.e. recording acts, marketable title acts, and statutes of limitation, have been, generally, upheld as constitutional by this Court and the courts of several states.

In order for this court to take jurisdiction under 28 USC 1257 (2) there must be involved a substantial federal question. There is no substantial federal question where the issues have been decided by previous decisions of this Court. *Utley* v *St. Petersburg*, 202 US 107, 786 L Ed 1155 (1933).

As noted by the Michigan Supreme Court, the constitutionality of recording statutes has already been decided by the United States Supreme Court, *Van Slooten*, supra, p. 47, citing *Jackson* v *Lampshire*, 28 US 280, 7 L Ed 679 (1830).

The purpose of recording acts is to protect the subsequent bona fide purchaser. This increases the alienability of land which in turn promotes its utlilty and development. Furthermore, they extinguish certain unrecorded interests, thus reducing possible litigation and giving a finality to

apparent circumstances. The penalty provided for failure to record is complete divestiture of title or of the interest.

The purpose of the Michigan dormant mineral act is "to facilitate the development of oil and gas resources," *Van Slooten, supra,* at 43; citing Street, "Need for Legislation to Eliminate Dormant Royalty Interests", 42 Mich State Bar J. 49 (March, 1963). It accomplishes this purpose by requiring holders of the severed oil and gas interest to either do any one of the enumerated acts respecting the oil and gas, or record a simple notice of claim of interest, at least once every (20) years. The penalty for failure to do any of those acts or record such notice is divestiture of the severed oil and gas interest.

Appellants attempt to distinquish the Michigan dormant mineral act from a recording act by arguing that the prior purchaser, divested of his interest or title under a recording act, has a cause of action against the seller. What the Appellants fail to recognize is the unique character of property. A purchaser does not wish merely to have his consideration returned. He wants the specific piece of property contemplated by his transaction. A purchaser of property is one of the few people for whom the law provides the remedy of specific performance. The recording statutes, just like the dormant mineral act, completely divest one person of his vested property right in favor of another. Yet the recording statutes have passed the constitutional tests. "So far as the writer knows, the constitutionality of the recording acts has never been seriously questioned." Aigler; "Constitutionality of Marketable Title Acts", 50 Mich Law Rev. 185, 197.

In discussing marketable title acts, Professor Aigler said:

> "These statutes, though varying in detail, have a common objective-the extinguishment in favor of certain persons of claims against, and interest in, land, which claims and interest arose out of events

> and transactions that occurred many years ago, unless such claims or interest have been preserved by the recording of a preserving notice within the period of time." Aigler, supra, at 185.

That description applies equally to the Michigan dormant mineral act. The Van Slooten court, correctly, percieved this analogy and stated ". . . . . it is sufficient to recognize at this point that statutes imposing recording requirements have been upheld when a reasonable time is provided for recording existing interests," *Van Slooten, supra*, at 47. In fact, the Michigan Court accepts the authority of the state to require periodic recording as a "given". "There is nothing inherent in a recording act which mandates that a recording be eternally effective, *Van Slooten, supra*, at 48, citing *America Land Co.* v *Zeiss*, 219 US 47; 47 S Ct 200; 55 L Ed 82 (1911).

In a leading case in this area, the Minnesota Supreme Court upheld that state's marketable title act in *Wechelman* v *Messner*, 250 Minn, 88; 83 NW 2d 800 (1957).

In Iowa, the Supreme Court of that state, applying its marketable title act, assumed its validity, *Lytle* v *Guilliams*, 41 NW 2d 668 (1950).

Marketable title acts are intended to shorten the period of a necessary title search and to make the record for that shortened period a safe and reliable record. *Aigler, supra*, p. 196. Marketable title acts are a legislative attempt to make repeated title searches less cumbersome, time consuming and expensive. A similar public policy supports the need for and the constitutionality of the Michigan dormant mineral act.

In Michigan, as in many other states, a mineral interest can be severed from the surface estate so that the oil and gas rights can be held by one person while the surface is owned by another often unrelated person. Frequently, these oil and gas rights, when severed, are divided between several persons in order to spread the cost of acquiring

these rights. In addition, owners of mineral interests often will acquire and convey interests in several parcels in order to enhance the probability of a return on their investment or simply to profit from the sale of the mineral interest rather than from the recovery and production of the mineral involved. Over long periods through formal conveyances or distribution following death of the interest holder, it is common that the mineral interests for a particular section will be held in small fractions by many people. Because of the numerous conveyances of these mineral interests the holders of these interests are often unacquainted with each other. This situation presents a difficulty of any owner of a fractional oil and gas interest who wishes to develop the potential oil and gas resources in the land. Many times the other mineral rights owners cannot be located. Tax assessment rolls are of no help since, in this state, the severed oil and gas interest owner pays no property tax on his interest. Often these people are spread over the entire country. Not even local inquiry will be of much assistance in locating the severed interest holders or their heirs.

In those situations when not all of the owners of the oil and gas rights can be located, the developer is faced with the question of whether to drill without their consent and participation. If he does drill and finds no oil or gas, the expense of a dry hole is borne by him and the other consenting owners and the missing owners avoid paying their fair share of the project. If he drills and finds oil or gas, the missing owners may come forward at a later date and will have a legal right, of course, to participate in the proceeds of the well. Had they been a part of the project before the drilling began, their share of costs and profits would have been negotiated and settled by agreement. After drilling has been completed however, there would be none of the certainty, established by pre-drilling contracts, as to the nature and extent of each owners interest. Given the substantial revenue oil and gas wells often produce, it becomes economically feasible to litigate every potential claim of this sort.

In addition, and, most importantly, given the enormous costs involved in drilling an oil and gas well, financial institutions or other investors are unwilling to become involved in a drilling project without the certainty pre-drilling contracts with ALL owners provide.

It has thus become the pattern in Michigan that no drilling take place unless all interests are located.

In addition, unlike many other minerals, oil and gas are uniquely difficult to isolate with certainty before exploration. A driller uses techniques of geological probing to tell where mineral reservoirs are likely, but even the best of these are uncertain. With a background of such uncertainty unless all the interests can be accounted for, the expensive testing or drilling to determine the likelihood of oil and gas in an area will probably never take place as little value will be seen in a test providing encouraging geologic information if the owners cannot be located. Thus, it follows again that if the owners cannot be found, the tests won't be run and wells won't be drilled.

Finally, since oil and gas fields do not conform to property lines and geologic testing is done over large areas, if certain portions of a field's potential oil and gas are held by unlocated owners, the testing in the whole field may not be done. Therefore, the owners of contiguous and nearby lands may well be deprived of having their land tested and developed because of the existence of dormant interests in the surrounding lands. However, should the contiguous holder be in a position to drill, it is highly likely that an injustice will occur because the well on the contiguous property may drain the whole reservoir which underlies both properties and, thus, deprives the owner, who cannot locate his co-owners, of any return. With other minerals, such as gravel or coal, an injustice of this sort would not be possible as the minerals cannot "traverse" the property lines as do oil and gas.

The dormant mineral act also may be said to be in the nature of a statute of limitations, and as such, represents an

adoption of the English approach to adverse possession and limitation statutes.

> "In England the chief emphasis has been upon the laches of the old owner and the barring of his remedy. The American view has instead emphasized the merit of the one in possession and has lead to an affirmative approach; i.e. has the person in possession acquired title rather than has the one out of title lost it. Thus, while the English view seeks to penalize an owner who has slept on his rights, American courts are more impressed with quieting a title which deserves protection." Brodwell, "Disseisen and Adverse Possession", 33 Yale L. J.1, 4-11 (1923), Mosburg, "Statutes of Limitation and Title Examination", 13 Okla L. Rev. 125 (1960).

The Michigan dormant mineral act establishes a limitation period beyond which no owner can go to establish title by constructive possession of record.

Despite the fact that statutes of limitation rarely define the characteristics of occupancy which will elevate the occupancy to the status of adverse possession, these requirements have been added by judicial construction.

Other statutes, such as the dormant mineral act, set out the requirements necessary to extinguish the title to the estate covered by the act.

One such statute setting out specific acts to deal with estates in land with unique characteristics was considered by this Court in *Soper* v *Lawrence Bros. Co.*, 201 US 359, 50 L Ed 788 (1905).

The Maine statute involved there (Maine Public Laws of 1805, Chap. 162 §1 & §4) was enacted to deal with estates in Main wild land—land not readily susceptible to possession by means of the usual acts theretofore required of the adverse possessor. It was found not to violate 14th Amendment standards.

Similarily, the Michigan dormant mineral act was enacted to deal with estates in oil and gas—estates not readily susceptible to possession by an adverse possessor.

In each instance the estates are such that the owner may virtually abandon them with little or no chance of losing them to an adverse possessor. And, in each statute the emphasis is on an absence of acts indicative of ownership, failure on the part of the true owner to assert his ownership.

This Court held that the legislature may create a hostile claimant to a lawful, vested property interest. In effect the Court held it to be within the power of the state to take certain acts regarding a presence on the land theretofore constituting a mere trespass, and elevate those acts to the status of disseisor.

> "The distinction between trespass and disseisin may be modified by statute as properly as it may be established by common law. Also statutes of limitation may be passed where formerly ther were none." *Soper* v *Lawrence Bros. Co.*, 201 US 350, 367, 50 L Ed 788, 791 (1905).

The significance of the omission of the owner to do any acts of ownership is also found in *Soper* v *Lawrence Bros. Co., supra*, at page 370:

> "Some objection was made to the effect given to a tax deed in the first part of the section. But that is not before us. We see nothing to indicate an intent to go beyond the law. *Marx* v *Hanthorn*, 148 US 172, 37 L Ed 410; 13 Sup, Ct. Rep. 508. As to the possibility that the taxes may have been assessed unlawfully or the recorded deed under which the defendant claims forged, it is admitted that such matters might be proved. As they are public facts, give color to the overt acts done upon the land, and MUST BE ACCOMPANIED BY A NECESSARY CONSCIOUS OMISSION OF THE PLAINTIFF

TO PAY TAXES OR DO ANY ACT OF OWNERSHIP, we see nothing to hinder the legislature making them sufficient, prima facie, at lease, to set the statute running and to put the former owners to a suit." (Emphasis Added)

The absence of an assertion of a hostile claim in the traditional sense is balanced by providing a relatively simple method to avoid the effects of the statute. The party against whom adverse possession in the traditional sense runs must re-enter, usually by means of a suit to recover possession. The Maine Statute made adverse possession of Maine wild lands possible by means of acts theretofore constituting a mere trespass, but the owner could likewise avoid the effects of this statute by relatively simple means, i.e. payment of taxes or doing acts of ownership. *Soper* v *Lawrence Bros. Co., supra* at page 370. The Michigan dormant mineral act can be avoided by merely recording a notice as well as by doing the acts indicative of actual or constructive possession set out therein. In addition, the dormant mineral act provides for simple re-recording which, in effect, allows a person to hold his severed oil and gas interest perpetually.

The dormant mineral act's definition of abandonment does not directly affect or interfere with the owner's domimion or indefinite right of user, control, and disposition. The act's effect on property is like that of adverse possession laws relating to color of title which do not constitute a deprivation of property without due process of law.

Like a statute of limitation, the Michigan dormant mineral act should be viewed as a procedural matter, and not, therefore, affecting substantive rights. It only changes the remedies by which those substantive rights are enforced. Bubalo, "Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act" 12 Ind. Law Rev. 455,462, and cases cited therein.

In a not unrelated matter, in *Selectmen of Nahant* v *United States*, (1968, D.C. Mass.) 293 F. Supp. 1076, the

court upheld the constitutionality of a statute which requires the timely recording of a possibility of reverter to prevent its extinguishment or to toll the running of a special statute of limitations.

Appellants have argued in their jurisdictional statement that, by the dormant mineral act, the state is taking title to oil and gas from one person and giving it to another without providing procedural or substantive due process. Appellee contends that there is no taking involved here, and, if there is, the appropriate due process considerations have been met.

Appellants liken the dormant mineral act to an eminent domain proceeding. In support of their argument they cite *Pennsylvania Coal Co.* v *Mahan*, 260 US 393 (1922); *Penn Central Trans. Co.* v *New York City*, 438 US 104, 127, reh. denied, 439 US 883 (1978) and *Northern Cheyenne Tribe* v *Hollowbreast* 425 US 649 (1976). Each of these cases, however, involved a taking of property, although *Northern Cheyenne* involves a non-vested interest.

The Michigan dormant mineral act takes no property. It merely places certain responsibilities on the owner of a severed oil and gas interest. The day after the act became effective every owner of a severed oil and gas interest in property in Michigan still held their respective interest, regardless of when created. Only failure to record the notice of claim, or do any of the enumerated acts, within the prescribed period, will cause the transfer of that interest. It is not a governmental act which deprives a person of his property, it is the failure of the property owner to fulfill his responsibilities under the law which results in divestiture. Just as failure to record a deed may result in loss of property, so too, under the dormant mineral act, failure to act will result in loss of property. See *Turner* v *New York*, 168 US 90, 18 S Ct 38 (1897).

Persons owning land have been and are generally assumed to be aware of their responsibilities under the law. Indeed, this Court has stated:

> "All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of property and of the procedure which they set up for those purposes." *American National Bank* v *Luckett*, 321 US 233, 243 (1944)

If the Court were to adopt the argument of Appellants then every legislative act which regulated property interests would have to be held in abeyance until the government, presumably, made a good faith attempt to notify all affected persons. This not only is absurd, but inordinately expensive, cumbersome and unnecessary. Neither has it ever been a constitutional requirement in the past. In *Goldblatt* v *Town of Hempstead*, 369 US 590 (1962) a city ordinance precluded excavation under the waterline. It extinguished, in effect, certain mineral interests. This Court upheld that ordinance finding that there was no taking involved even though the mineral interests were essentially forfeited to the town's use.

Appellants may argue that *Goldblatt, supra*, is distinguishable in that no actual transfer of property took place there while under the dormant mineral act there is an actual transfer of title. But so too is there a transfer of title under the recording acts and the marketable title acts, yet these latter statutes are constitutional.

The due process requirements applicable in eminent domain proceedings aren't applicable to legislative acts. So long as there is a valid public purpose to the legislation, it applies to entire classes of persons similarly situated, and it is not merely a charade adopted in order to circumvent normal eminent domain proceedings these legislative acts should be upheld. Ultimately, there is a political solution available to the citizenry for ill advised action by their legislatives.

> "Where government plays the role of an impartial arbiter between the rights of competing societal interest groups, eminent domain safegaurds ought not to be implemented." Bubalo, supra, p. 477.

The Appellants reliance or *Mullane* v *Central Hanover Bank & Trust Co.*, 339 US 306 (1950) is inopposite. There the Court was faced with a taking of specific property as a result of a pending action. The Court required notice and a meaningful hearing.

The Van Slooten court held that the statute itself provides sufficient notice of its recording requirements. *Van Slooten, supra,* at 52,n. 28 and cases cited therein. Importantly, the statute does not preclude a judicial hearing to determine whether the statutory elements have in fact been met. Similarly, an adverse possession statute does not require a pre-deprivation hearing nor does it preclude an ultimate judicial determination of the operative facts. Given the countervailing need for and purpose of the statute, to facilitate the development of oil and gas interests, due process requires no pre-deprivation hearing here.

## CONCLUSION

The Michigan dormant mineral act is merely an extension to the area of severed oil and gas interests of the same legal principals which have sustained, as constitutional, recording acts, marketable title acts and statutes of limitation. The act in question here has a valid public purpose. It does not violate either substantive or procedural due process standards. The appeal of Appellants should be dismissed or, in the alternative, the decision of the Michigan Supreme Court in *Van Slooten* v *Larsen et al.* should be affirmed.

Respectfully submitted,
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